In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1342

SUN PROTECTION COMPANY OF AMERICA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

1. On February 18, 1965, the district court entered a default judgment against the Branch Coal Corporation in favor of the United States for $95,785.79, the amount found due and owing on two secured loans made by the Small Business Administration.

On March 19, 1965, the district court entered an order directing the sale of certain real and personal property of Branch Coal to satisfy the debt (Pet. App. 9). That order stated that the property was to be sold on April 23, 1965, to the highest bidder. Paragraph 2 of that order directed as follows:

> The successful bidder shall be required to deposit with the Marshal in cash or by certified or cashier's check a sum equal to 10% of his total

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> bid immediately upon the property being struck down to him. If he does not do so, the Marshal may at his discretion immediately offer the property again for sale. The successful bidder must deposit the entire balance of his bid with the Marshal within 30 days from the date of confirmation or on or before June 5, 1965. If he does not do so, his deposit shall be forfeited and be paid into the registry of the Court for satisfaction of costs incurred and thereafter to be applied against the Judgment debt outstanding, and all rights of the buyer in the said real estate and personal property shall cease and be completely void. The buyer shall be responsible for all state, local or Federal transfer taxes or stamps.

Petitioner was the highest bidder at the April 23 sale, and pursuant to the district court's order, deposited $8,000 (10% of its $80,000 bid) with the Marshal (Pet. App. 9). When petitioner failed to complete the sale within the required time, the district court ordered that the property be resold on October 29, 1965, and directed that a portion of petitioner's deposit be paid out to cover advertising, taxes paid, and expenses incurred for the care and preservation of the property. The Small Business Administration purchased the property on October 29, for $25,000.

On May 11, 1966, the district court ordered that the remainder of petitioner's deposit ($3,949.22) be distributed to the Marshal ($538.45) to defray the costs of the second sale, and to the SBA ($3,410.77)

to be applied to its judgment.[1] The court of appeals affirmed that order, holding that the district court had authority to order a judicial sale of the property, and that, under federal law, the setting of terms for a judicial sale, including provision for a forfeiture, was within the court's discretion.

2. The decision below is plainly correct, and there is no occasion for further review by this Court.

Petitioner's principal argument is that the district court's order setting the terms and conditions of the April 23 sale is void because it did not comply with Pennsylvania law. But petitioner does not cite any Pennsylvania authority which would prohibit a forfeiture of its deposit. Accordingly, certiorari plainly would not be warranted because there is no showing that state law directs a result different from that reached below. Indeed the court below (Pet. App. 10 n.1) adverted to Pennsylvania authority which supports the district court's action.

Since the sale was a judicial, rather than an execution sale,[2] however, the court below correctly held that the conduct of the sale was governed by federal law, set out in 28 U.S.C. 2001 *et seq.* Under 28 U.S.C. 2001(a), real property disposed of in a judicial sale

[1] Because the order of May 11, 1966, was not received by petitioner, it was vacated and re-entered by the district court on January 18, 1967.

[2] This Court has noted the distinction between judicial sales, "made under order or decree of the court and requiring confirmation by the court for their validity," and execution sales "which issue by mere praecipe of the judgment creditor * * * without order of the court, * * * and only come under judicial supervision on complaint of either party." *Yazzoo & M.V.R.R. Co.* v. *Clarksdale*, 257 U.S. 10, 19.

shall be sold "upon such terms and conditions as the court directs."[3] The district court did not abuse its discretion under this statute either by providing for the forfeiture of the deposit of a purchaser who failed to complete the sale, or by applying that provision of the order to petitioner.

3. Contrary to petitioner's contention, the decision below is not in conflict with *Weir* v. *United States*, 339 F. 2d 82 (C.A. 8). That case merely holds that state procedures must be followed in *execution sales* under Rule 69(a), Fed. R. Civ. P.[4] And the opinion in *Weir* makes it clear that *judicial sales* are governed by the terms of the federal statutes, 28 U.S.C. 2001 *et seq.*, and not by state law (339 F. 2d 85–86).[5]

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

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[3] As for personal property, 28 U.S.C. 2004 directs that it shall be sold "in accordance with section 2001 of this title, unless the court orders otherwise."

[4] Under Rule 69(a), execution sales are to be made "in accordance with the practice and procedure of the state in which the district court is held * * * except that any statute of the United States governs to the extent that it is applicable. * * *"

[5] We see no basis for petitioner's remaining contention (Pet. 3–4) that the order of March 19, 1965, cannot be construed as permitting use of its deposit for any expenses except those incurred in advertising the first sale. The order plainly contemplates that the entire deposit be "forfeited", and that it be used "for satisfaction of costs incurred and thereafter to be applied against the judgment debt outstanding * * *."

U.S. GOVERNMENT PRINTING OFFICE: 1968